

1

FILED
95 • 809 NOV 24 1995

No.

OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,

VS.

PAUL L. SPINK,
Respondent.

On Petition For A Writ of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

GORDON E. KRISCHER
(Counsel of Record)
DAVID E. GORDON
KENNETH E. JOHNSON
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, CA 90071-2899
(213) 669-6000

KENNETH S. GELLER
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006-1882
(202) 463-2000

RALPH A. HURVITZ
Associate General Counsel
Lockheed Martin Corporation
6801 Rockledge Drive
Bethesda, Maryland 20034
(301) 897-6134

Attorneys for Petitioners
Lockheed Corporation, et al.

QUESTIONS PRESENTED

1. Whether, contrary to the holdings of nine other circuits, the Ninth Circuit correctly held that a pension plan sponsor can be liable for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), when it amends the terms of its pension plan.

2. Whether the Ninth Circuit correctly held that the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA"), applies retroactively to require pension benefit accruals for years an employee lawfully was excluded from plan participation, in the absence of any clear intent by Congress to impose retroactive liability for pension benefits.

PARTIES

The parties are Lockheed Corporation; Daniel M. Tellep; Robert A. Furman; Vincent N. Marafino; K.H. Anderson; L. Bernard; R.W. Berry; P.N. Braun-Agel; D.L. Bronco; R.H. Northcutt; W.E. Skowronski; A.G. Van Schaick; and W.T. Vincent, Petitioners; and Paul L. Spink, Respondent (on behalf of himself and similarly situated individuals).

Pursuant to Rule 29.6 of the Rules of the Supreme Court, petitioners state that Lockheed Martin Corporation is the parent corporation of Lockheed Corporation and that Lockheed Martin Corporation and Lockheed Corporation have the following subsidiaries (other than wholly owned subsidiaries): Aeroplex of Central Europe, American Stone Company, Bahama Rock Limited, Bayou Mining, Inc., Central Rock Company, EO Systems International, Limited, Guangzhou Aircraft Maintenance Eng., Co., Ltd., Gulf Technology Systems Group, Hellenic Business Development & Investment Co., SA, Letlock Saudi Arabia, Lockheed Aircraft Argentina, SA, Lockheed Investment Holding Co., AS, Lockheed Khrunichev Energia Int'l, Inc., Lockheed Martin (UK) Limited, Martin Marietta Aggregates, Inc., Martin Marietta Magnesia Specialties Inc., Martin Marietta Materials Canada Limited, Martin Marietta Materials, Inc., Space Imaging, Inc., Standard Magnesia Limited, Superior Stone Company, Toshiba Electronic Systems Co., Ltd., Tusas Aerospace Industries, Inc., Western Investor Technology Group, Inc.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION BELOW HOLDING THAT LOCKHEED'S DESIGN OF THE EARLY RETIREMENT PROGRAM CONSTITUTES A PROHIBITED TRANSACTION AND BREACH OF FIDUCIARY DUTY DEPARTS FROM THE RULE FOLLOWED BY OTHER CIRCUITS.	7
A. The Ninth Circuit Improperly Imposed Fiduciary Standards Upon A Plan Sponsor When Adopting Eligibility Requirements For A New Plan Benefit ..	7

B.	The Decision Below Conflicts With The Decisions Of Other Circuits	8
C.	The Decision Below Is Wrong On The Merits	12
II.	THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN <i>LANDGRAF V. USI FILM PRODUCTS</i> , BY HOLDING THAT OBRA 1986 HAS RETROACTIVE APPLICATION DESPITE THE ABSENCE OF ANY "CLEAR CONGRESSIONAL INTENT" TO THAT EFFECT	16
A.	The Language Of Section 9204(a)(1) Expressly Provides That Sections 9201 And 9202 Apply Prospectively	19
B.	The Use Of Different Language To Confirm Prospective Application In Section 9204(b) Does Not Create A Negative Inference That Section 9204(a)(1) Operates Retroactively	22
C.	The Internal Revenue Service, Which Is The Agency Charged With The Enforcement Of OBRA 1986, Has Interpreted Sections 9201 And 9202 To Have Prospective Application Only As Applied To Individuals Who Were Not Participants Before OBRA 1986	23

III.	THE DECISION BELOW HAS IMPACT BEYOND JUST THE NINTH CIRCUIT, BECAUSE IT PUTS IN JEOPARDY MANY SOCIALY BENEFICIAL VOLUNTARY EARLY RETIREMENT PROGRAMS AND WILL DISCOURAGE EMPLOYERS FROM ADOPTING SUCH PROGRAMS IN THE FUTURE	26
	CONCLUSION	30

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>AARP v. EEOC</i> , 655 F. Supp. 228 (D.D.C.), <i>rev'd</i> , 823 F.2d 600 (D.C. Cir. 1987)	18
<i>Anderson v. John Morrell & Co.</i> , 830 F.2d 872 (8th Cir. 1987)	11
<i>Astor v. International Business Machines Corp.</i> , 7 F.3d 533 (6th Cir. 1993)	15
<i>Averhart v. U S West Management Pension Plan</i> , 45 F.3d 1480 (10th Cir. 1994)	11
<i>Belade v. ITT Corp.</i> , 909 F.2d 736 (2d Cir. 1990)	10
<i>Bell v. Trustees of Purdue University</i> , 658 F. Supp. 184 (N.D. Ind. 1987), <i>remanded</i> , 845 F.2d 1023 (7th Cir. 1988), <i>on remand</i> , 761 F. Supp. 1360 (N.D. Ind. 1991), <i>aff'd</i> , 975 F.2d 422 (7th Cir. 1992)	18
<i>Bob Jones University v. United States</i> , 461 U.S. 574 (1983)	25
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984)	25
<i>Cirillo v. ARCO Chemical Co.</i> , 862 F.2d 448 (3d Cir. 1988)	15
<i>Curtiss-Wright Corp. v. Schoonejongen</i> , ___ U.S. ___, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995)	7

<i>Farr v. U S West, Inc.</i> , 58 F.3d 1361 (9th Cir. 1995)	29
<i>Fletcher v. Kroger Co.</i> , 942 F.2d 1137 (7th Cir. 1991)	9
<i>Ford Motor Co. v. Milhollin</i> , 444 U.S. 555 (1980)	25
<i>Harlan v. Sohio Petroleum Co.</i> , 677 F. Supp. 1021 (N.D. Cal. 1988)	15
<i>Hozier v. Midwest Fasteners, Inc.</i> , 908 F.2d 1155 (3d Cir. 1990)	10
<i>Izzarelli v. Rexene Prods. Co.</i> , 24 F.3d 1506 (5th Cir. 1994)	10
<i>Joanou v. Coca-Cola Co.</i> , 26 F.3d 96 (9th Cir. 1994)	12, 29
<i>Johnson v. Georgia-Pacific Corp.</i> , 19 F.3d 1184 (7th Cir. 1994)	9, 13, 14
<i>Landgraf v. USI Film Products</i> , ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)	6, 16, 22, 30
<i>Lea v. Republic Airlines, Inc.</i> , 903 F.2d 624 (9th Cir. 1990)	29
<i>M&R Investment Co. v. Fitzsimmons</i> , 685 F.2d 283 (9th Cir. 1982)	13
<i>Madden v. ITT Long Term Disability Plan</i> , 914 F.2d 1279 (9th Cir. 1990), <i>cert. denied</i> , 498 U.S. 1087 (1991)	29
<i>Mead Corp. v. Tilley</i> , 490 U.S. 714 (1989)	25

<i>Mongeluzo v. Baxter Travenol Long Term Disability Plan</i> , 46 F.3d 938 (9th Cir. 1995)	29
<i>Moore v. Reynolds Metals Co. Retirement Program</i> , 740 F.2d 454 (6th Cir. 1984), cert. denied, 469 U.S. 1109 (1985)	11
<i>Musto v. American General Corp.</i> , 861 F.2d 897 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989)	11
<i>Orozco v. United Air Lines, Inc.</i> , 887 F.2d 949 (9th Cir. 1989)	29
<i>Phillips v. Amoco Oil Co.</i> , 799 F.2d 1464 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987)	11, 14
<i>Richardson v. Pension Plan of Bethlehem Steel Corp.</i> , ___ F.3d ___, 1995 U.S. App. LEXIS 28837 (9th Cir. Oct. 17, 1995)	29
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983)	7
<i>Siskind v. Sperry Retirement Program, Unisys</i> , 47 F.3d 498 (2d Cir. 1995)	10
<i>Sutton v. Weirton Steel Division</i> , 724 F.2d 406 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984)	10
<i>Williams v. Caterpillar, Inc.</i> , 944 F.2d 658 (9th Cir. 1991)	29

Statutes

Internal Revenue Code

§ 410(a)(2), 26 U.S.C. § 410(a)(2)	17
§ 411(b)(1)(H), 26 U.S.C. § 411(b)(1)(H)	24
§ 411(b)(1)(H)(v), 26 U.S.C. § 411(b)(1)(H)(v)	25

Age Discrimination in Employment Act

§ 4(i)(1), 29 U.S.C. § 623(i)(1)	1, 18
§ 4(i)(7), 29 U.S.C. § 623(i)(7)	25

Employment Retirement Income Security Act

§ 3(21)(A), 29 U.S.C. § 1002(21)(A)	1, 3, 4
§ 202(a)(1)(A), 29 U.S.C. § 1052(a)(1)(A)	7
§ 202(a)(2), 29 U.S.C. § 1052(a)(2)	17, 21
§ 203(a), 29 U.S.C. § 1053(a)	7
§ 204(a), 29 U.S.C. § 1054(a)	7
§ 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i)	1, 18
§ 204(b)(1)(H)(vi), 29 U.S.C. § 1054(b)(1)(H)(vi)	25
§ 204(g), 29 U.S.C. § 1054(g)	7
§ 406, 29 U.S.C. 1106	13
§ 406(a), 29 U.S.C. § 1106(a)	13
§ 406(a)(1), 29 U.S.C. § 1106(a)(1)	1, 8
§ 406(a)(1)(D), 29 U.S.C. 1106(a)(1)(D)	6, 8, 12, 13
§ 502(e)(2), 29 U.S.C. 1132(e)(2)	29

Omnibus Budget Reconciliation Act of 1986

§ 9201	1
§ 9202(a)(2)	1
§ 9203	1
§ 9204	1
§ 9204(a)	5, 22
§ 9204(a)(1)	21, 22
§ 9204(b)	21, 22

Administrative Interpretations

43 Fed. Reg. 43,264 (1978)	18
53 Fed. Reg. 11,877 (1988)	24
Prop. Treas. Reg. § 1.411(b)-2	24
Prop. Treas. Reg. § 1.411(b)-2(f)(91)(ii)	24
Temp. Treas. Reg. § 1.411(a)-4T(c)	15
Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D)	15
Treas. Reg. § 1.401(a)(4)-4(b)(2)(ii)(B)	15
Treas. Reg. § 1.401(k)-1(a)(3)(iv)	26
Treas. Reg. § 1.411(a)-4(c)	15
T.A.M. 9516005 (Dec. 22, 1994)	15

Legislative History

H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. (1986), <i>reprinted in</i> 1986 U.S.C.C.A.N. 4023	23
S. Rep. No. 101-79, 101st Cong., 1st Sess. (1989)	28
S. Rep. No. 101-263, 101st Cong., 2d Sess. (1990), <i>reprinted in</i> 1990 U.S.C.C.A.N. 1509	15, 18

Other Authorities

General Accounting Office, <i>Downsizing Strategies Used in Selected Organizations</i> , GAO/GGD 95-54 (1995)	27
General Accounting Office, <i>Use of Waivers by Large Companies Offering Exit Incentives to Employees</i> , GAO/HRD 89-87 (1989)	27
Grant, The "Open Window" – Special Early Retirement Plans in Transition, 16 Empl. Ben. J. 10 (March 1991)	28
Hewitt Associates, <i>Early Retirement Windows, Lump Sum Options, and Postretirement Increases in Pension Plans</i> (1992)	27

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners respectfully submit that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 60 F.3d 616, and is reprinted in the Appendix hereto at 1a-21a. The court's denial of rehearing, App. 22a, is unreported. The district court's opinion is unofficially reported at 15 Employee Benefits Cas. (BNA) 2242 and 61 Empl. Prac. Dec. (CCH) ¶ 42,094, and is reprinted in the Appendix at 23a-35a.

JURISDICTION

The court of appeals' opinion was filed on July 18, 1995. A timely petition for rehearing was denied on September 1, 1995. This petition is being timely filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes are involved in this case: ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1); § 9201 of OBRA 1986, 29 U.S.C. § 623(i)(1); § 9202(a)(2) of OBRA 1986, 29 U.S.C. § 1054(b)(1)(H)(i); § 9203 of OBRA 1986, 100 Stat. 1979 (1986); and § 9204 of OBRA 1986, 100 Stat. 1979-80 (1986), *codified at* 29 U.S.C. § 623 note. The pertinent text of these statutes is set forth in the Appendix at 36a-39a.

STATEMENT OF THE CASE

Factual Background. Petitioner Lockheed Corporation ("Lockheed") sponsors a pension plan, the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan"). Prior to 1986, Lockheed was permitted, by the express terms of ERISA and the ADEA, to lawfully exclude from Plan participation those employees who were hired within five years of normal retirement age. Lockheed's Plan contained such a provision, which stated that an employee who was more than 60 years old when hired was not eligible to participate in the Plan. Congress eliminated this exclusion from pension plan participation when it enacted OBRA 1986, with the proviso that the new rule would not take effect until 1988.

Respondent Paul L. Spink was first employed by Lockheed in 1939, and then intermittently through 1950. After an interim of nearly 30 years, during which he worked for other employers in the defense industry, Lockheed again hired respondent in 1979, at age 61. Respondent did not become a Plan participant at this time, because he was over 60 years old. Instead, respondent first became a Plan participant on December 25, 1988, when OBRA 1986 took effect with respect to Lockheed's Plan.¹

In 1990, Lockheed offered a voluntary early retirement window program for the purpose of reducing the size of its workforce in connection with a drastic reduction in Lockheed's business operations in Southern California. In order to implement this decision, Lockheed's Board of Directors amended the terms of the Plan to provide additional retirement benefits beyond the benefits to which employees would otherwise be entitled, for those employees who qualified and volunteered to leave their Lockheed

¹ The provisions of OBRA 1986 in question applied generally to plan years beginning on or after January 1, 1988. Lockheed's first Plan year following January 1, 1988, commenced on December 25, 1988.

employment. Eligibility for these enhanced early retirement benefits was made subject to certain conditions specified in the Plan amendment, one of which was that each retiring employee seeking to take advantage of the program was required to sign an agreement releasing Lockheed from any claims relating to the employee's decision to elect early retirement.

Respondent did not participate in the special early retirement window program, and therefore never signed any release. Instead, respondent worked until June 30, 1990, when he voluntarily retired from Lockheed. Respondent concedes that Lockheed has complied with the written terms of the Plan in calculating his pension benefits at all times since his retirement. App. at 25a n.1.

The complaint. The district court complaint, filed by respondent on behalf of himself and as representative of a class of persons similarly situated, challenged both the release requirement of the 1990 early retirement window program, as well as Lockheed's decision not to retroactively credit respondent and the putative class members for pre-1988 employment when calculating pension benefit accruals. On the challenge to the design of the 1990 early retirement program, the complaint alleged that Lockheed, and individual members of its Board of Directors, breached the fiduciary duty provisions of ERISA by amending the Plan to require a release as a condition of receipt of the additional pension benefits. This claim was premised on the allegation that Lockheed acted not only as the Plan sponsor, but also as a "fiduciary" within the meaning of § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

On the second point -- whether OBRA 1986 requires retroactive pension benefit accruals -- the complaint alleged that Lockheed's decision not to retroactively accrue pension benefits for pre-1988 employment service violated the ADEA and ERISA. Respondent did not dispute the proposition that, under the law that

applied to Lockheed prior to December 25, 1988, the Plan lawfully excluded from participation individuals such as himself who were hired within five years of normal retirement age, and who had not accrued any pension benefits under the Plan prior to that date. Nonetheless, respondent alleged that OBRA 1986 required Lockheed to provide retroactive benefit accrual for his pre-1988 employment upon his becoming a Plan participant in 1988.

The district court's decision. The district court, in a decision by Judge Stephen V. Wilson, granted Lockheed's Rule 12(b)(6) motion to dismiss the complaint prior to class certification. The district court's jurisdiction was based upon § 502(a) of ERISA, 29 U.S.C. § 1132(a). The court rejected respondent's argument that Lockheed had breached a fiduciary duty or engaged in a prohibited transaction under ERISA by amending the Plan to condition eligibility for the enhanced early retirement benefits upon a release of claims. The court noted that "ERISA permits employers to wear 'two hats,' and . . . assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." App. at 29a. The court concluded that "the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan . . ." App. at 30a. Because Lockheed had acted in a corporate, rather than fiduciary, capacity when amending the Plan, the court concluded that "[Lockheed's] actions can not comprise a breach of the fiduciary duty owed to the Plan participants because no such fiduciary duty existed." App. at 31a.

The district court also held that the "plain language of OBRA 1986 . . . defeats Plaintiff's claim" for retroactive benefit accrual. App. at 26a. In finding that OBRA 1986 had prospective effect only, the court observed that OBRA 1986 expressly provided that eligibility for pension plan participation for employees hired

within five years of normal retirement age (and thus lawfully excluded from a plan) was to begin only with plan fiscal years commencing on or after January 1, 1988, which in Lockheed's case was December 25, 1988. App. at 27a. The court then concluded that "because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual." App. at 27a. The court also noted that "the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion," since § 9204(a) of OBRA 1986 expressly limited application of these amendments to Plan years beginning on or after January 1, 1988. App. at 27a-28a. Given this "unambiguous statutory language," the court concluded that "Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation." App. at 28a.

The court of appeals decision. The court of appeals, in a decision authored by Judge Melvin Brunetti and joined by Judges Stephen Reinhardt and Dorothy W. Nelson, reversed the decision of the district court on both of respondent's claims. First, it held that OBRA 1986 applies retroactively. Thus, the court determined that OBRA 1986 requires employers not only to permit employees who had been hired within five years of normal retirement age to participate in pension plans for plan years beginning in 1988, but to retroactively "include pre-enactment service years in calculating accrued benefits." App. at 8a n.1. In reaching this conclusion, the court expressly disagreed with the administrative interpretation of the Internal Revenue Service ("IRS"), the agency charged by Congress with interpreting OBRA 1986, that there is no requirement for retroactive pension benefit accruals in the case of individuals who had not previously been participants. App. at 13a n.3.

The court of appeals also held that Lockheed breached its fiduciary duty under ERISA by amending its Plan to require a

release of claims as a precondition to participation in the additional benefits created by the early retirement window. App. at 13a-18a. Although the court acknowledged the abundant case law holding that Lockheed has "extensive" freedom to amend its Plan, it held that Lockheed was "not free to disregard the prohibitions of ERISA." App. at 16a. Specifically, the court concluded that, by amending the Plan to require a release as a condition of receiving additional benefits to which the participant would not otherwise be entitled, Lockheed engaged in a prohibited transaction under § 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), because the Plan amendment "provided for use of Plan assets to purchase a significant benefit for Lockheed." App. at 18a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision errs on two significant issues of law, both of which have nationwide impact. First, by holding a pension plan sponsor to fiduciary standards when adopting eligibility criteria for a new pension benefit, the decision conflicts with the rule followed by every other circuit to consider the issue. Second, by holding that the benefit accrual provisions of OBRA 1986 apply retroactively, the decision not only deviates from this Court's recent decision in *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), but also conflicts with the administrative interpretation of the statute by the IRS, the agency charged with administering OBRA 1986. Both errors will have a substantial adverse impact on employers and pension plan sponsors, which routinely administer pension plans in the same manner as Lockheed. Because these widely accepted practices have now been branded unlawful by the Ninth Circuit, further review is plainly warranted.

I. THE DECISION BELOW HOLDING THAT LOCKHEED'S DESIGN OF THE EARLY RETIREMENT PROGRAM CONSTITUTES A PROHIBITED TRANSACTION AND BREACH OF FIDUCIARY DUTY DEPARTS FROM THE RULE FOLLOWED BY OTHER CIRCUITS.

A. The Ninth Circuit Improperly Imposed Fiduciary Standards Upon A Plan Sponsor When Adopting Eligibility Requirements For A New Plan Benefit.

This Court has recognized that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S. Ct. 1223, 1228, 131 L. Ed. 2d 94 (1995). Pension plans are also freely amendable, so long as the plan sponsor satisfies the substantive conditions established by ERISA such as minimum participation, funding, and vesting requirements.² *Id.*; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). No argument has ever been made that the 1990 amendment to Lockheed's Plan violated any of these substantive requirements: the Plan amendment did not deny respondent the right to continued participation in the Plan, nor did it diminish any of his vested pension benefits, nor did it cause the Plan to become underfunded. Instead, the Plan amendment provided *additional* pension benefits to eligible participants who voluntarily elected early retirement. The amendment therefore falls

² These substantive requirements are set forth in 29 U.S.C. § 1052(a)(1)(A) (minimum participation requirements); 29 U.S.C. § 1053(a) (minimum vesting requirements); 29 U.S.C. § 1054(a) (minimum accrual standards). *See also* 29 U.S.C. § 1054(g) (prohibiting certain types of plan amendments, but not the type at issue here). The court of appeals did not hold that Lockheed's Plan amendment violated any of these provisions.

within the broad latitude accorded to plan sponsors to freely amend their plans so long as ERISA's minimum standards are satisfied.

The court of appeals disregarded this basic principle, holding instead that Lockheed's amendment of the Plan to provide additional pension benefits was a fiduciary act that caused the Plan to engage in a prohibited transaction.³ App. at 18a. This unprecedented holding departs from the text of ERISA, as well as the uniform interpretation of the statute adopted by the other circuits and the administrative agencies charged with enforcing ERISA, because it improperly imposes fiduciary responsibilities upon an employer when it amends a plan. The fallacy of this reasoning is that amending a pension plan is *not* prohibited by ERISA, so long as the statutory minimum standards are satisfied, and is *not* under any circumstances a fiduciary act or a "transaction" within the meaning of ERISA § 406(a)(1).

As a result, the decision below severely curtails a plan sponsor's freedom to amend a plan under ERISA, because it holds for the first time that a plan sponsor can be liable when it creates new plan benefits in a manner consistent with ERISA's substantive requirements. The decision should be reviewed because both the text of ERISA and this Court's prior decisions confirm that plan amendments are permitted under these circumstances.

B. The Decision Below Conflicts With The Decisions Of Other Circuits.

At least nine other circuits have considered the issue of whether employers (or other plan sponsors) are held to fiduciary

³ Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), provides:

A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect — (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan;

standards when amending an ERISA plan. All of these circuits have squarely held that, when establishing eligibility requirements for a pension plan, an employer (or other plan sponsor) does *not* act in a fiduciary capacity. The plan sponsor is therefore free to adopt eligibility requirements that promote its own corporate interests, even when those interests conflict with the interests of the participants or beneficiaries of the plan, so long as the minimum participation, funding, and vesting requirements of ERISA are satisfied.

A good example of this rule can be seen in the Seventh Circuit decision in *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994). There, a company that maintained an overfunded pension plan found itself the target of a hostile takeover bid. Seeking to make itself an unattractive target, the corporation amended its pension plan to provide that, if a takeover occurred, the surplus plan assets would be fully used to pay benefits to active employees only. Certain retirees sued, contending among other things that the corporation had breached a fiduciary duty by "using" plan assets to serve its own interests.

The Seventh Circuit assumed for purposes of its decision that the corporation's "managers were up to no good — that they amended the pension plan to serve their own interests." 19 F.3d at 1186. Even with the assumption that the plan was amended for reasons of "managerial self-protection," *id.*, the Seventh Circuit affirmed the dismissal of the plaintiffs' claim on the ground that the company had "dealt with the plan as settlor, not as trustee," *id.* at 1188, and that "when amending the plan . . . the defendants did not act as fiduciaries under ERISA." *Id.* Accord *Fletcher v. Kroger Co.*, 942 F.2d 1137, 1139 (7th Cir. 1991) (employer's decision to provide special retirement benefits only to selected employees "was a design decision that did not implicate [the employer's] fiduciary duties under ERISA"). The reasoning of the

Ninth Circuit below thus directly conflicts with that of the Seventh Circuit.

The Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits also recognize that amending an ERISA plan is *not* a fiduciary act and therefore cannot constitute a prohibited transaction. A partial listing of the decisions reflecting this rule appears below:

Second Circuit. *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) ("An employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary."); *Belade v. ITT Corp.*, 909 F.2d 736 (2d Cir. 1990) (employer's decision to exclude certain employees from the design of an early retirement program does not implicate fiduciary duties under ERISA).

Third Circuit. *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160-61 (3d Cir. 1990) ("we find it extremely unlikely that Congress, in defining an ERISA fiduciary in section 3(21)(A), intended that the word 'administration' encompass amendment decisions, thus sweeping away by indirection the limitations so meticulously built into the participation and vesting requirements").

Fourth Circuit. *Sutton v. Weirton Steel Division*, 724 F.2d 406, 411 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) (plan amendments which reduced unfunded contingent benefits were "not to be reviewed by fiduciary standards").

Fifth Circuit. *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, provided that the benefits reduced or eliminated are not accrued or vested at the time, and

that the amendment does not otherwise violate ERISA or the express terms of the plan").

Sixth Circuit. *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) ("[n]either Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide"); *Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second.").

Eighth Circuit. *Anderson v. John Murrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987) (employer permitted to unilaterally amend welfare benefit plan).

Tenth Circuit. *Averhart v. U S West Management Pension Plan*, 46 F.3d 1480, 1488 (10th Cir. 1994) ("the selective provision of benefits under the [pension plan] amendment was a matter of plan design not subject to ERISA's fiduciary standards and judicial review").

Eleventh Circuit. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) ("the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits").

The Ninth Circuit's departure from this rule in the decision below warrants review because the court's analysis conflicts with

the preceding authorities in that it imposes fiduciary liability upon a plan sponsor for amending the plan.⁴

C. The Decision Below Is Wrong On The Merits.

Section 406(a)(1)(D) of ERISA provides, in pertinent part, that "[a] fiduciary" shall not cause a pension plan to engage in a "transaction [that] constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, or any assets of the plan" 29 U.S.C. § 1106(a)(1)(D). The Ninth Circuit determined that "Lockheed's adoption of the 1990 plan amendments" constituted a prohibited transaction within the meaning of Section 406(a)(1)(D) "because the amendments provided for use of Plan assets to purchase a significant benefit for Lockheed." App. at 18a. In other words, the court of appeals held that Lockheed breached its fiduciary duty when it amended its Plan to provide early retirement benefits, because the releases required as a condition of eligibility for those new benefits "relieved Lockheed of countless liabilities or potential liabilities to thousands of employees." *Id.* at 17a-18a.⁵

⁴ The decision below acknowledged that prior Ninth Circuit decisions, such as *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994), reflect an employer's "extensive" freedom to amend a plan. App. at 15a. However, the court then proceeded to hold that, under certain circumstances, a plan amendment may constitute a prohibited transaction, App. at 16a, which cannot be reconciled with the rule followed by the other circuits.

⁵ In a footnote, the Ninth Circuit attempted to disclaim any intention of deciding the issue of whether "an employer acts as a fiduciary when it amends the plan in a way that affects plan assets." App. at 14a n.5. Unless Lockheed acted as a fiduciary when it amended the Plan, however, Lockheed and the Plan's trustees (who are fiduciaries) could not engage in a prohibited transaction, or otherwise breach their fiduciary duties, when they administered the amended Plan in accordance with its terms. Moreover, the district court directly addressed the issue of whether amending the Plan was a fiduciary act and expressly held that it was not. App. at 30a-31a. The Ninth Circuit's reversal of this ruling makes it clear that it has, in fact, held the amendment to be a fiduciary act.

The principal flaw in the court's reasoning lies in its failure to recognize that, in amending the Plan to create new pension benefits for a certain group of existing participants who volunteered to leave their Lockheed employment, Lockheed was not acting in a fiduciary capacity and did not engage in any sort of "transaction," prohibited or otherwise, under ERISA § 406.⁶ The Seventh Circuit in *Johnson* rejected a "prohibited transaction" argument virtually identical to the one accepted by the decision below, holding that no prohibited transaction could occur because none of the actions in question, including both the plan amendment and administration of the plan in conformity with that amendment, "transferred, sold, exchanged, or otherwise affected any asset of the plan." 19 F.3d at 1189. Contrary to the decision below, the Seventh Circuit correctly held that the plan sponsor's decision to amend cannot be a prohibited transaction as a matter of law, because amending the plan is a settlor function rather than a fiduciary act.

In attempting to rationalize its prohibited transaction holding, the decision below characterized the eligibility requirement for the early retirement window program -- that a release be signed by early retirees as a condition of receiving additional benefits -- as a "purchase" of releases with the use of Plan assets. App. at 13a. This "purchase" analogy, however, only emphasizes the absence of any unlawful fiduciary conduct. If the Plan fiduciaries had paid money from the Plan to settle lawsuits against Lockheed that were unrelated to pension benefits, they would, as the opinion below suggests, have violated ERISA § 406(a)(1)(D). But that is not what happened. The fiduciaries of Lockheed's Plan did not transfer assets to Lockheed, nor did they use Plan assets to pay

⁶ The court of appeals' misreading of the applicable law is exemplified by its citation to its prior decision in *M&R Investment Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982), as "holding that a plan amendment" violated a different prohibition in ERISA § 406(a). App. at 16a. In fact, *M&R Investment Co.* involved a loan (which clearly is a "transaction"), and *not* a plan amendment.

third parties who had asserted claims against Lockheed. Instead, Plan assets were used solely to pay additional benefits to participants who satisfied the conditions of the early retirement window, *pursuant to the amended terms of the Plan*. The Seventh Circuit's decision in *Johnson* holds that this cannot be a prohibited transaction because a plan sponsor's decision to increase pension benefits cannot fairly be viewed as the "management or disposition of [a plan's] assets" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). 19 F.3d at 1189. *Accord, Phillips v. Amoco Oil Co.*, 799 F.2d at 1472 (rejecting plaintiffs' prohibited transaction argument as "patently inapplicable to the facts of this case").

Moreover, this "purchase" rationale would logically apply to a wide range of routine business practices heretofore never thought to constitute unlawful prohibited transactions. Employers routinely create or amend their pension plans (as opposed to raiding and using a plan's assets) to add new benefits or increase present benefits for express corporate purposes such as attracting and retaining employees, deferring employee compensation from immediate taxation, settling collective bargaining disputes, avoiding strikes, and providing compensation increases without using immediate cash or in lieu of wage increases. All of these practices and many others provide substantial benefits to the employer. Of course, that is their very purpose. Until the decision below, however, no court ever suggested that these common employer practices were illegal "purchases" made with plan assets.

Enticing employees voluntarily to retire early for additional retirement benefits conditioned upon a release of employment-related claims against their employer also obviously serves a corporate purpose. But just as an employer may amend its pension plan to increase retirement benefits to end a strike or substitute as a wage increase, the employer is not taking and using plan assets in a prohibited transaction or engaging in any other fiduciary

breach when it amends its plan to encourage voluntary early retirement. Moreover, early retirement windows serve a useful social purpose — retirement with income is preferable to layoff without income — as recognized by Congress when it specifically approved waivers of ADEA claims in retirement window situations. *See* S. Rep. No. 101-263, 101st Cong., 2d Sess. 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1557 ("Early retirement incentive plans are extremely popular with older workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need for involuntary layoffs . . .").

The decisions of other circuits have either not questioned under ERISA, or upheld the validity of, releases given in exchange for enhanced retirement and other benefits under employee benefit plans.⁷ In addition, the Treasury Department has adopted regulations which expressly recognize that pension plans may condition the receipt of benefits upon covenants not to compete and on waivers as long as nondiscrimination and vesting requirements are satisfied. *See* Treas. Reg. §§ 1.411(a)-4(c), Example (1), 1.401(a)(4)-4(b)(2)(ii)(B); Temp. Treas. Reg. § 1.411(a)-4T(c), Example (1); *see also* Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) (relying on § 1.401(a)(4)-4(b)(2) for purposes of applying the nondiscrimination standards to an early retirement window plan).⁸ By characterizing the plan amendment adopting the release requirement as a "prohibited transaction," the Ninth Circuit has

⁷ *See, e.g., Astor v. International Business Machines Corp.*, 7 F.3d 533 (6th Cir. 1993); *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988). *See also Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1025 (N.D. Cal. 1988).

⁸ The IRS has also ruled that a prohibited transaction does not occur merely because a funded pension plan is amended to assume responsibility for benefits previously paid from the employer's general assets. *See* T.A.M. 9516005 (Dec. 22, 1994).

achieved a result that is inconsistent with both Treasury regulations and the law of every other circuit to consider the issue.

The Court should therefore accept this case for review, in order to resolve the important issue of whether a plan sponsor acts as a fiduciary, or engages in a prohibited transaction under ERISA, when it amends its pension plan to achieve a "significant benefit," App. at 18a, for the employer.

II. THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN *LANDGRAF V. USI FILM PRODUCTS*, BY HOLDING THAT OBRA 1986 HAS RETROACTIVE APPLICATION DESPITE THE ABSENCE OF ANY "CLEAR CONGRESSIONAL INTENT" TO THAT EFFECT.

The decision below also held that the substantive change in the law contained in OBRA 1986 must be given retroactive effect, so that employers would be compelled to grant benefit accrual for service *before* employees became participants in their employers' pension plans. App. at 5a. In respondent's individual case, this means that Lockheed is required to retroactively grant him pension benefit credit for all years since he was hired in 1979, *even though he did not become a Plan participant until 1988*.

The result reached by the Ninth Circuit is flatly inconsistent with this Court's recent decision in *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), which held that statutes are presumed to apply prospectively, and will not be applied retroactively "absent clear congressional intent favoring such a result." 114 S. Ct. at 1505. *Landgraf* emphasizes that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 1497. This stems from the closely related notions that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and

to conform their conduct accordingly," and that "settled expectations should not be lightly disrupted." *Id.* The decision below is contrary to these principles, because by holding OBRA 1986 to apply retroactively, the court of appeals has imposed substantial additional pension liabilities upon Lockheed as well as numerous other employers without any statutory language that compels such a result.

The court of appeals' error is apparent in light of the substantive changes made by OBRA 1986. Prior to OBRA 1986, both ERISA and the ADEA recognized two different rules that permitted pension plans to distinguish between older and younger employees. For convenience, petitioners will refer to one rule as the "Age 60 Exclusion Rule" and the other rule as the "Post-NRA Accrual Cessation Rule" where "NRA" refers to normal retirement age.

The Age 60 Exclusion Rule refers to the fact that prior to OBRA 1986 both ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2), and § 410(a)(2) of the Internal Revenue Code, 26 U.S.C. § 410(a)(2), allowed employees hired within five years of the age specified by the plan as the "normal retirement age" to be excluded from participating in a pension plan.⁹ Because most plans defined normal retirement age as 65, this petition refers to this rule as the Age 60 Exclusion Rule. The Age 60 Exclusion Rule was eliminated by section 9203 of OBRA 1986.

The second rule, referred to above as the Post-NRA Accrual Cessation Rule, permitted plans to cease accruals of pension benefits for years of participation after a participant attained normal retirement age. Thus, even if an older employee had become a participant in a pension plan, it was still lawful for

⁹ In Lockheed's case, this meant that employees hired at age 60 or older could lawfully be excluded from the Plan. Such a provision was in fact included within Lockheed's Plan. App. at 9a n.2.

the plan to provide that no further benefit accrual would be made on his or her behalf under the plan after attainment of normal retirement age.

Unlike the statutory basis for the Age 60 Exclusion Rule, the basis for the Post-NRA Accrual Cessation Rule rested in the legislative history of the 1978 amendments to the ADEA.¹⁰ This legislative history caused the Department of Labor to promulgate an interpretation of the ADEA that allowed the Post-NRA Accrual Cessation Rule. 43 Fed. Reg. 43,264 (1978). From the time of its promulgation the Post-NRA Accrual Cessation Rule was attacked as an incorrect interpretation of the ADEA.¹¹ The EEOC's failure to repeal the rule eventually led to litigation challenging the rule, which was ongoing at the time Congress considered and passed OBRA 1986.

Sections 9201 and 9202 of OBRA 1986 eliminated the Post-NRA Accrual Cessation Rule. Section 9201 of OBRA 1986 amended the ADEA to make it unlawful for an employer to maintain a pension plan "which requires or permits -- (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, . . ." 29 U.S.C. § 623(i)(1). Section 9202(a)(2) of OBRA 1986 made a parallel amendment to ERISA. 29 U.S.C. § 1054(b)(1)(H)(i) (1988).

¹⁰ This legislative history is summarized in the initial district court decision in *Bell v. Trustees of Purdue University*, 658 F. Supp. 184, 187-189 (N.D. Ind. 1987), *remanded*, 845 F.2d 1023 (7th Cir. 1988), *on remand*, 761 F. Supp. 1360 (N.D. Ind. 1991), *aff'd*, 975 F.2d 422 (7th Cir. 1992).

¹¹ As recounted in *AARP v. EEOC*, 655 F. Supp. 228 (D.D.C.), *rev'd*, 823 F.2d 600 (D.C. Cir. 1987), the EEOC (which succeeded the DOL as the agency with enforcement authority over the ADEA) went through a series of gyrations beginning in 1980 with respect to whether the DOL's interpretation should be repealed. 655 F. Supp. at 233-34.

A. The Language Of Section 9204(a)(1) Expressly Provides That Sections 9201 And 9202 Apply Prospectively.

OBRA 1986 expressly provided that the abolition of the Post-NRA Accrual Cessation Rule was not to take effect until on or after January 1, 1988. There is no hint of retroactivity in this statutory language:

The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

Pub. L. No. 99-509, § 9204(a)(1); 100 Stat. 1979 (1986), *codified at* 29 U.S.C. § 623 note. The district court concluded that the "plain language" of this statute compelled the conclusion that sections 9201 and 9202 did not apply retroactively. App. at 26a. The district court further held that because respondent was not a Plan participant prior to December 25, 1988, he did not accrue any pension benefit credit prior to that date. *Id.*

By contrast, the court of appeals held that the "most natural reading" of the same statutory language compelled the conclusion that "pre-enactment service years must be included in benefit accrual calculation;" *i.e.*, that the statute "applies retroactively." App. at 7a & n.1. This reasoning seriously misreads the plain language of the statute, however, because it confuses the concepts of (1) the "rate of an employee's benefit accrual" (as used in sections 9201 and 9202 of OBRA 1986) with (2) the total benefit accrued.

The court of appeals' error is best illustrated by the deceptively simple, yet illogical, syllogism used in its opinion. After correctly noting that the OBRA 1986 amendments forbid age-

based reductions in "the rate of benefit accrual," App. at 7a, the court stated:

Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the Plan results in a reduced rate of benefits for that employee. Therefore, denying credited service years that an older employee would otherwise have accumulated is unlawful under OBRA.

It is true, of course, that respondent's entirely lawful exclusion from the Plan for nine years resulted in a reduction of his total accrued benefits as of December 25, 1988 — he had none since he had never participated in the Plan and no benefit is provided for employees who were never participants. But section 9202 does not refer to an individual's total accrued benefits. Instead, section 9202 forbids age-based distinctions in the *rate* at which employees accrue benefits; *i.e.*, the plan must accrue benefits at the same rate for all participants regardless of age. A "rate of benefit accrual" differs from the concept of total accrued benefits in the same way that a vehicle's speed in miles per hour differs from the total miles travelled.¹²

¹² This is illustrated as follows: Assume that respondent's final compensation were \$50,000 a year, that the Plan had a 1.5% of final compensation times years of participation formula, and that respondent would have had nine years of participation on December 25, 1988, if Lockheed had never adopted the Age 60 Exclusion Rule. (This is basically the Lockheed Plan's formula without certain calculations not relevant here.) Using these assumptions, it may be seen that the controversy between respondent (and the putative class he seeks to represent) and Lockheed concerns the amount of his accrued benefit under the Plan on December 25, 1988, when he commenced participation. Respondent asserts that this accrued benefit is \$6,750 (nine years times .015 times \$50,000). Lockheed asserts that the accrued benefit is \$0 (zero years times .015 times \$50,000). Neither party disputes, however, that respondent's *rate of benefit accrual* became 1.5% with respect to future service, *i.e.*, service from December 25, 1988, onward. The dispute relates only to the amount of accrued benefits that should be credited to respondent (and similarly situated employees) as of his first day of participation in the Plan, for years of service when he was *not* a participant in the Plan.

If OBRA 1986 is applied prospectively, then once respondent became a participant he would commence accruing benefits at exactly the same rate as the other participants upon its effective date, with neither a cessation of benefit accruals nor a reduction in the rate of his accrual. This would completely satisfy both sections 9201 and 9202. The decision below nonetheless found this interpretation of OBRA 1986 to be untenable because it would lead to "discriminatory effects," since respondent would receive no pension credit for his pre-1988 employment with Lockheed and thus would receive a smaller pension than if he were given such credit. App. at 9a. This, however, is circular reasoning. The so-called "discriminatory effects" are simply the result of prospectively applying a new statute that expanded the concept of age discrimination. The Ninth Circuit's rationale is inconsistent with *Landgraf*, because under the Ninth Circuit's reasoning any expansion of the employment discrimination laws would have to be applied retroactively in order to avoid similar "discriminatory effects."

The decision below fails to acknowledge that the statutory language does *not* state that the new benefit accrual rule should be applied retroactively; instead, section 9204(a)(1) states that the new rule is to be applied "only with respect to plan years beginning on or after January 1, 1988, . . ." The court of appeals' contrary interpretation is not supported by the statutory language, since no part of the statute states that OBRA 1986 is to be applied retroactively. Moreover, the decision deprives a different portion of OBRA 1986 — section 9204(b) — of any rational meaning, thus violating a basic canon of statutory interpretation.¹³

¹³ Section 9204(b) contains the effective date for section 9203 of OBRA 1986. Section 9203 addresses when employees are eligible to become plan participants, and repealed the portion of ERISA, 29 U.S.C. § 1052(a)(2), allowing the Age 60 Exclusion Rule. Section 9204(b) states:

(continued...)

B. The Use Of Different Language To Confirm Prospective Application In Section 9204(b) Does Not Create A Negative Inference That Section 9204(a)(1) Operates Retroactively.

The court below also concluded that because the effective date language in section 9204(a)(1) differed slightly from that of section 9204(b), section 9204(a)(1) should be read to require retroactivity. This reasoning also fails to survive scrutiny. This Court held in *Landgraf* that "negative inferences" made from the inclusion of prospectivity language in one part of a statute but not another cannot constitute clear legislative intent of retroactivity. *Landgraf*, 114 S. Ct. at 1493. Indeed, *Landgraf* rejected an argument quite similar to the one adopted in the decision below, since it placed "extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute." *Id.*

The Ninth Circuit erred on this point because it failed to recognize that Congress had other reasons for using slightly different effective date language in sections 9204(a)(1) and 9204(b). While no one had suggested that the Age 60 Exclusion Rule violated the ADEA, pending litigation sought to overturn the Post-NRA Accrual Cessation Rule. *Supra* pp. 17-18. Congress was well aware of this controversy, and responded by attempting to leave open the ultimate resolution of the issue of accrual cessation (for pre-OBRA 1986 participants) for the then ongoing litigation by

¹³ (...continued)

The amendments made by section 9203 shall apply only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date.

The Ninth Circuit's holding leaves section 9204(b) with no rational meaning, since years of participation are significant essentially *only* when calculating benefit accrual. If Congress intended to provide retroactive benefit accrual for employees for the periods prior to their participation, it could have expressly done so and would certainly not have included section 9204(b) as part of OBRA 1986.

using slightly different effective date language in section 9204(a).¹⁴ There was absolutely no controversy, however, with respect to the legality of excluding from pension plans the thousands of employees (such as respondent) who were hired within five years of normal retirement age, because ERISA and the Internal Revenue Code expressly permitted this practice. Since no dispute existed on this issue, Congress adopted unambiguous prospective date language in section 9204(b). Its decision to do so does not imply that section 9204(a)(1) was intended to require retroactive pension benefit accrual for pre-1988 employment, because Congress could have mandated that result through express statutory language had it sought to do so. Imposition of such a substantial retroactive liability on plans and plan sponsors throughout the nation, who for years lawfully excluded many thousands of employees from plan participation, should not be lightly implied from congressional silence.

C. The Internal Revenue Service, Which Is The Agency Charged With The Enforcement Of OBRA 1986, Has Interpreted Sections 9201 And 9202 To Have Prospective Application Only As Applied To Individuals Who Were Not Participants Before OBRA 1986.

The Ninth Circuit's decision is wrong for the additional reason that it conflicts with the interpretation of the IRS, the agency charged with enforcement of OBRA 1986. The IRS announced, in 1988, that it would interpret OBRA 1986 as having only prospective effect with regard to benefit accruals for the

¹⁴ The Conference Report for OBRA 1986 acknowledged this controversy by stating that "[d]isagreement exists as to whether and to what extent benefit accruals . . . are required under ADEA, as currently in effect." H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 378 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4023.

thousands of employees who first became eligible to participate in a plan following enactment of OBRA 1986:

In the case of an employee who was ineligible to participate in a plan before the effective date of amended Code section 410(a)(2) because of a maximum age condition and who is eligible to participate in the plan on or after the effective date of such section, . . . *hours of service and years of service credited to the employee before the first plan year beginning on or after January 1, 1988, are not required to be taken into account for purposes of determining the employee's accrued benefit under the plan for plan years beginning on or after January 1, 1988.*

Preamble to Prop. Treas. Reg. § 1.411(b)-2, 53 Fed. Reg. 11,877 (1988) (emphasis added). The same rule is stated in the text of the Proposed Regulation itself:

[A] defined benefit plan is not required under [I.R.C.] section 411(b)(1)(H) [which corresponds to 29 U.S.C. §§ 623(i)(1) and 1054(b)(1)(H)(i)] to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan.

Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii).

The court of appeals refused to defer to these expert administrative views because the IRS's proposed regulation has not yet been finalized, declaring that "we need not accord deference to [the IRS's] proposed interpretations." App. at 13a n.3. This ignores the special fact present here, however, that the IRS had previously announced that its final regulations implementing OBRA 1986 will follow the proposed regulation on this point. IRS Notice 88-126, 1988-2 C.B. 538 (1988). The IRS also stated that the proposed regulation constitutes an "administrative pronouncement" which "may be relied upon to the same extent as a revenue ruling

or revenue procedure" and that "[t]axpayers may rely on this notice until the final regulations are published." *Id.* Thousands of taxpayers, including Lockheed, have in fact relied upon this IRS pronouncement since 1988. Because IRS revenue rulings are generally accorded deference in interpreting a statute that the IRS is charged with administering, *Bob Jones University v. United States*, 461 U.S. 574, 596 (1983), the IRS's interpretation of OBRA 1986 as having prospective application only should have been considered and given weight. *See Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989) (directing the court of appeals to consider the views of the IRS, because "[f]or a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass'"), *quoting Ford Motor Co. v. Milhollin*, 444 U.S. 555, 568 (1980). *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).¹⁵

Under *Landgraf*, statutes are not to be applied retroactively absent clear evidence in the statute itself that Congress so intended. There is no such evidence here; instead, all of the evidence is to the contrary. Further review is essential to correct the court of appeals' egregious failure to follow this Court's ruling in *Landgraf*.

¹⁵ The IRS is specifically authorized by statute to issue regulations implementing OBRA 1986. *See* 26 U.S.C. § 411(b)(1)(H)(v). Moreover, these Treasury regulations are to control the interpretation of the amendments made by OBRA 1986 to ERISA and the ADEA. *See* 29 U.S.C. §§ 623(i)(7) and 1054(b)(1)(H)(vi).

III. THE DECISION BELOW HAS IMPACT BEYOND JUST THE NINTH CIRCUIT, BECAUSE IT PUTS IN JEOPARDY MANY SOCIALLY BENEFICIAL VOLUNTARY EARLY RETIREMENT PROGRAMS AND WILL DISCOURAGE EMPLOYERS FROM ADOPTING SUCH PROGRAMS IN THE FUTURE.

The decision below warrants review not only because it is incorrect and inconsistent with the decisions of this Court, other circuits, and the administrative interpretation of the IRS, but also because it will create enormous practical problems in the administration of ERISA plans. The Ninth Circuit failed to recognize that employers routinely derive from their employee benefit plans a wide array of significant benefits that do not differ in any meaningful respect from the benefits Lockheed enjoyed as a result of the early retirement plan it offered its employees. For example, employers frequently reach agreements, when collectively bargaining with labor unions, in which the *quid pro quo* for enhanced retirement benefits is a lower wage increase, if not an outright wage reduction. Similarly, employers often allow employees to participate in a pension plan only if they agree in exchange to reduced wage compensation.¹⁶ If the decision below is correct, then all of these commonplace practices — each of which could be described as a "use of Plan assets to purchase a significant benefit" for the plan sponsor, App. at 18a — would violate ERISA.

Besides calling into serious doubt the legality of thousands of plan amendments designed to benefit sponsoring employers, the Ninth Circuit's decision will be particularly disruptive because it invalidates a wide-spread method of corporate downsizing through the offering of enhanced retirement or other benefits under a "window" program. A 1989 report, prepared by the General

¹⁶ Such agreements are expressly recognized by Treasury regulations. E.g., Treas. Reg. § 1.401(k)-1(a)(3)(iv).

Accounting Office ("GAO") showed that 80 percent of the companies listed in the Fortune 100 had offered some sort of exit incentive program (such as a "window" program) in the prior ten years, and that 55 percent of a sample of employers of 25,000 or more employees had sponsored such a program between 1981 and 1985. See General Accounting Office, *Use of Waivers by Large Companies Offering Exit Incentives to Employees*, GAO/HRD 89-87 at 2 (1989) ("1989 GAO Report"). Of employers that sponsored exit incentive programs, over 70 percent offered enhanced early retirement benefits under the company's pension plan, either alone or in combination with non-plan benefits. *Id.* at 4-5. More recent GAO and private studies confirm that this trend in usage of early retirement programs has continued into the 1990's.¹⁷

The empirical data also show that employee waivers of claims against the employer, similar to those used by Lockheed and declared illegal by the decision below, have been a frequent condition for eligibility in early retirement window programs. The 1989 GAO report estimated that 30 percent of the Fortune 100 companies that sponsored an exit incentive program required participating employees to sign a waiver as a condition for receiving enhanced benefits. See 1989 GAO Report at 2. Similarly, a 1991 report from an educational foundation in the employee benefit plan area reported that "[a]bout one-quarter of the firms utilizing early retirement programs ask employees who accept the incentives to retire to sign a form releasing the employer from any claim the

¹⁷ See General Accounting Office, *Downsizing Strategies Used in Selected Organizations*, GAO/GGD 95-54 (1995) (reporting that 17 of 25 large organizations that had undergone downsizing efforts (including 17 major corporations, 5 state governments, and 3 foreign governments) had provided early retirement programs); see also Hewitt Associates, *Early Retirement Windows, Lump Sum Options, and Postretirement Increases in Pension Plans* (1992) (reporting that 186 companies from a survey of approximately 700 companies had offered early retirement window programs between 1988 and 1992 and that 56 of these companies had offered more than one such program).

employee might have against the firm." Grant, The "Open Window" -- Special Early Retirement Plans in Transition, 16 Empl. Ben. J. 10, 15 (March 1991).

The holding of the decision below -- invalidation as prohibited transactions under ERISA of waiver agreements used in connection with enhanced early retirement benefits -- not only declares illegal a longstanding and widespread practice, but is also impossible to reconcile with the ADEA, the federal law that most directly speaks to waivers in the context of early retirement incentive programs. In amending the ADEA in 1990, Congress expressly recognized that employee waivers are commonly sought in the context of early retirement window programs like that implemented by Lockheed. See S. Rep. No. 101-79, 101st Cong., 1st Sess. 3-17 (1989). Indeed, the ADEA sets forth criteria that apply when the waiver is sought in connection "with an exit incentive or other employment program," which encompasses programs like the one sponsored by Lockheed. 29 U.S.C. § 626(f)(1)(H). See also S. Rep. No. 101-263, 101st Cong., 2d Sess. 32 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1538 (the "trademark of voluntary reduction programs is a standardized formula or package of benefits designed to induce employees voluntarily to sever their employment"). It would be bizarre if Congress's efforts in 1990 to define the scope of permissible ADEA waivers were totally meaningless because such waivers are flatly banned by ERISA, yet that is the effect of the decision below.

The decision below will not only invalidate these extremely common employer practices in the nine states within the Ninth Circuit, but as a practical matter will do so on a nationwide basis. The population and economic growth of the states within the Ninth Circuit, combined with the extremely liberal venue rules of ERISA, make it likely that numerous nationwide employers will be subject

to suit in the Ninth Circuit even if headquartered elsewhere.¹⁸ Unless reviewed and reversed by the Court, the decision below will establish national policy on the important issues it decides because any nationwide employer will be forced to treat the decision as dispositive of those issues.

The court of appeals' second holding -- that OBRA 1986 has retroactive effect -- will similarly have nationwide impact on every employer which adopted the Age 60 Exclusionary Rule and which, although headquartered elsewhere, does business and has employees within the Ninth Circuit. These employers, for the past seven years, have relied upon the proposed IRS regulations published in 1988, which correctly interpreted OBRA 1986 to have prospective application only. Unless the decision below is accepted for review and reversed, employers and pension plans nationwide will now, at great cost retroactively imposed, be required to provide past service credit for benefit accrual purposes for those years of service prior to 1988 for which thousands of employees were previously lawfully excluded from plan participation.

¹⁸ ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), provides that an action under ERISA may be brought in a United States district court in any district, *inter alia*, "where a defendant resides or may be found." Because so many employers may be "found" in the Ninth Circuit, employers headquartered outside of the circuit have frequently been sued there under ERISA. As an example, the following reported decisions involve ERISA suits against major employers whose headquarters (listed in parentheses and taken from Forms 10-K filed with the Securities and Exchange Commission) are outside of the circuit: *Mongeluzo v. Baxter Travenol Long Term Disability Plan*, 46 F.3d 938 (9th Cir. 1995) (Illinois); *Farr v. U S West, Inc.*, 58 F.3d 1361 (9th Cir. 1995) (Colorado); *Richardson v. Pension Plan of Bethlehem Steel Corp.*, ___ F.3d ___, 1995 U.S. App. LEXIS 28837 (9th Cir. Oct. 17, 1995) (Pennsylvania); *Joanou v. Coca-Cola Co.*, 26 F.3d 96 (9th Cir. 1994) (Georgia); *Williams v. Caterpillar, Inc.*, 944 F.2d 658 (9th Cir. 1991) (Illinois); *Orozco v. United Air Lines, Inc.*, 887 F.2d 949 (9th Cir. 1989) (Illinois); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990) (Minnesota); *Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279 (9th Cir. 1990), *cert. denied*, 498 U.S. 1087 (1991) (New York).

In sum, the Ninth Circuit's erroneous construction of ERISA and OBRA 1986 will have severe adverse consequences for thousands of employers throughout the United States. Because the decision below conflicts with the decisions of the other circuits, and ignores the approach to retroactivity only recently emphasized by this Court in *Landgraf*, further review is essential.

CONCLUSION

For the foregoing reasons, petitioners urge the Court to grant certiorari in this case.

DATED: November 17, 1995.

Respectfully submitted,

GORDON E. KRISCHER
(Counsel of Record)

DAVID E. GORDON

KENNETH E. JOHNSON

O'MELVENY & MYERS

400 South Hope Street

Los Angeles, CA 90071-2899

(213) 669-6000

KENNETH S. GELLER

MAYER, BROWN & PLATT

2000 Pennsylvania Ave., N.W.

Washington, D.C. 20006-1882

(202) 463-2000

RALPH A. HURVITZ

Associate General Counsel

Lockheed Martin Corporation

6801 Rockledge Drive

Bethesda, MD 20034

(301) 897-6134

Attorneys for Petitioners

Lockheed Corporation, et al.

FOR PUBLICATION

No. 92-56094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. SPINK,

Plaintiff-Appellant,

v.

LOCKHEED CORPORATION; DANIEL M. TELLEP; ROBERT
A. FURMAN; VINCENT N. MARAFINO; K.H. ANDERSON;
L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L.
BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G.
VAN SHAICK; W.T. VINCENT,

Defendants-Appellees.

Argued and Submitted

February 1, 1994 -- Pasadena, California

Filed July 18, 1995

Before: Dorothy W. Nelson, Stephen Reinhardt,
and Melvin Brunetti, Circuit Judges

Opinion by Judge Brunetti

COUNSEL

Theresa M. Traber, Bert Voorhees, Traber & Voorhees,
Pasadena, California, for the plaintiff-appellant.

Gordon E. Krischer, David E. Gordon, Paul Borden,
O'Melveny & Myers, Los Angeles, California, for the
defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

Paul Spink filed a complaint on behalf of himself and similarly situated individuals against Lockheed Corporation and certain individual defendants (collectively "Lockheed"). Spink alleged that Lockheed's retirement plan violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 631 *et seq.*, as amended by the Omnibus Budget Reconciliation Act of 1986 (OBRA 1986), Pub. L. No. 99-509, 100 Stat. 1874 (1986). The complaint also included individual claims based on ERISA and the federal common-law doctrine of equitable estoppel. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Spink appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

I. FACTS AND PROCEEDINGS BELOW

Because we are reviewing a dismissal of Spink's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), we accept as true all the following material allegations of the complaint. *See Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994).

Spink worked for various subsidiaries and divisions of the Lockheed Corporation between 1939 and 1950. In May 1979, Spink again began working for Lockheed at the age of 61. At the time he was rehired, the terms of the Lockheed Corporation Retirement Plan for Certain Salaried Employees (Plan) lawfully

excluded Spink from participating because he was over sixty years old. The Plan is a noncontributory defined benefit plan that covers substantially all salaried employees at Lockheed and certain subsidiaries.

Prior to rejoining Lockheed in 1979, Spink worked for Hughes Helicopters, where he expected to receive pension benefits if he continued to work through October 31, 1982. In an effort to recruit Spink from Hughes, Lockheed represented that if he accepted its offer of employment, Spink would participate in the Plan and would accrue credited service toward retirement benefits under the Plan during his subsequent employment with Lockheed. Lockheed personnel provided him with documents describing the benefits to which he would be entitled, and for the next four years sent him written year-end statements from the Plan notifying him of the amount of credited service he had accumulated as a Plan participant.

Lockheed notified Spink sometime in 1984 that he was not eligible to participate in the Plan because he was over sixty when hired.

In 1986, Congress passed OBRA 1986. OBRA 1986 amended ERISA, the ADEA, and the Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.*, to bar age-based discrimination in participation and benefit accrual standards applied by employee benefit plans.

As a consequence of these amendments, for plan years beginning after January 1, 1988, the effective date of the amendments, Lockheed was required to allow employees hired after age sixty to participate in the Plan. Spink became a

participant on December 25, 1988 (the first day of the Plan's 1988 plan year). In 1989, Lockheed informed him that it did not intend to credit him with accrued benefits based on his years of service with Lockheed prior to December 25, 1988. The Plan specifies that an employee who was previously excluded from the Plan would "not receive Credited Service for his pre-Member service []" under the terms of the Plan. Plan § 2.01(C).

On May 8, 1990, Lockheed amended the Plan, establishing a "1990 Special Retirement Opportunity" (SRO) and a "1990 Voluntary Retirement Program" (VRP), which were available to certain employees until June 30, 1990 (collectively the "1990 Plan amendments"). These programs offered increased retirement benefits to eligible employees as an incentive to terminate their employment. The increased benefits were paid out of the Plan's surplus assets. To partake in the increased pension benefits, Lockheed required employees to release virtually all potential employment-related claims they might have against Lockheed. Although he was eligible for the SRO option, Spink did not elect it because he did not wish to waive any ADEA and ERISA claims he may have against Lockheed. Spink retired in June 1990.

On February 5, 1992, Spink filed a five-count complaint against Lockheed. He brought all counts in his individual capacity, and also designated Counts I through III as a class action on behalf of all similarly situated employees. Counts I and II allege that the OBRA 1986 amendments to ERISA and ADEA entitle Spink and similarly situated employees to benefits under the Plan calculated on the basis of periods worked both before and after the effective date of the statute. Count III alleges that the 1990 Plan amendments constituted a breach of fiduciary duty and a prohibited transaction under ERISA. Count V alleges that because Spink

relied on representations made by Lockheed, Lockheed is estopped from denying him benefits based on all of his employment since his rehire in 1979. Spink withdrew Count IV.

Lockheed moved to dismiss the complaint under Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief can be granted, and the district court granted Lockheed's motion and dismissed the complaint with prejudice. Spink timely appeals.

II. STANDARD OF REVIEW

We review de novo a grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849, 852 (9th Cir.), cert. denied, 115 S. Ct. 580 (1994). In addition, "the interpretation of ERISA, a federal statute, is a question of law subject to de novo review." *Spain v. Aetna Life Ins. Co.*, 13 F.3d 310, 312 (9th Cir. 1993).

III. AGE DISCRIMINATION CLAIMS UNDER ERISA AND ADEA

We first consider whether the OBRA amendments to the ADEA and ERISA prohibit Lockheed from excluding Spink's and putative class members' pre-1988 years of service in calculating their accrued benefits. We conclude they do.

Prior to OBRA 1986, the ADEA and ERISA permitted an employer to deny participation in its pension plan to an employee who was over age sixty when hired if the plan's retirement age was sixty-five. See ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2) (1982 & Supp. V 1988); ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1982

& Supp. V 1988). Congress enacted OBRA 1986 to change this situation.

The overall objective of the OBRA amendments was to "prohibit arbitrary age discrimination in employment." ERISA § 2, 29 U.S.C. § 621 (1988). To that end, § 9202 of OBRA 1986 amended ERISA by adding:

[A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

29 U.S.C. § 1054(b)(1)(H)(i) (1988). Similarly, OBRA § 9201 amended the ADEA by providing:

[I]t shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits --

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, . . .

ADEA § 4(i)(1), 29 U.S.C. § 623(i)(1) (1988 & Supp. V 1993). With regard to the effective date of these sections, OBRA 1986 provides:

The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

Pub. L. No. 99-509, § 9204(a)(1); 100 Stat. 1979 (1986), *codified at* 29 U.S.C. § 623 note.

The parties agree that OBRA 1986 prohibits terminating or reducing the rate of benefit accrual because of the employee's age after January 1, 1988. They part ways over whether this prohibition requires that employers consider service years before the effective date of OBRA 1986 in calculating benefit accrual.

As with every question of statutory interpretation, we start with the language of the statute. The most natural reading of the text of OBRA 1986 §§ 9201 and 9202 compels us to conclude that pre-enactment service years must be included in benefit accrual calculation. OBRA prohibits age-based reduction in "the rate of benefit accrual." Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the Plan results in a reduced rate of benefits for that employee. Therefore, denying credited service years that an older employee would otherwise have accumulated is unlawful under OBRA.¹

¹ Spink and Amicus, the American Association of Retired Persons, argue that including in benefit accrual any service years before OBRA 1986's effective date would not be a retroactive application of the amendments. Rather, they contend, this interpretation would merely apply the current law, prohibiting reduction of benefits based on age, to the operative formula. See *Puckett v. United Air Lines, Inc.*, 705 F. Supp. 422, 424 (N.D. Ill. 1989). We disagree.

In the context of this case, the Plan provides that "eligibility for benefits under the Plan and the amount of a Member's benefit are determined on the basis of service." Plan § 4.01. An employee could participate in the Plan, and therefore accumulate credited service years, "upon being employed in a Covered Group" unless—prior to OBRA's effective date—the employee commenced employment when he or she was sixty years of age or older. Plan § 2.01(B) & (C). Because Spink began work in a Covered Group after he had celebrated his sixtieth birthday, he did not become a Member of the Plan when he began work. Had he not been excluded because of his age, he would have begun to accumulate credited service years when he started working in a Covered Group and all those years would be used to calculate the amount of his benefits. Put another way, Spink's credited service was calculated as lower than that of a younger employee's because

¹ (...continued)

To the extent our interpretation requires employers to include pre-enactment service years in calculating accrued benefits, it applies retroactively. Retroactivity depends on whether the new provision attaches new legal consequences to events completed before its enactment. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 & n.3 (1994). "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 1499. In light of the fact that OBRA 1986 prohibits a previously legal basis for discriminating in pension plans, and in consideration of the increase in pension obligations that will result from inclusion of pre-enactment service years, we acknowledge that OBRA 1986 operates retroactively in this context. However, this observation does not affect our conclusion because our analysis is based on retroactive intent of the statute manifested in its text. *See id.* at 1492; *see also* H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 379 (1986), reprinted in 1986 U.S.C.C.A.N. 4024 ("The conferees recognize that repeal of [law that permits age-based exclusion from plans] may have the effect of increasing an employer's minimum funding requirements significantly from employees hired within five years of normal retirement age.").

he was denied credit for all years of his employment in a Covered Group.²

Such an age-based reduction in the rate of accrual is the essence of OBRA's express prohibitions. The fact that the reduction would be accomplished indirectly, through reducing the number of credited service years, rather than directly by reducing the rate itself, is of no consequence.

Lockheed would have us focus on the cause of the disparity: the previously lawful exclusion of older employees from participation in the Plan. This argument raises the question of cause and effect. Since the cause of the disparity was lawful, Lockheed urges, the disparate result must therefore be lawful. However, OBRA 1986 does not speak to causes. Rather, by invalidating age-based reductions in the Plan's benefit accrual, OBRA 1986 forbids the discriminatory effects of the Plan. Lockheed cannot avoid the prohibition against age-based reductions in benefits by pointing to previously lawful causes of those reductions. *See* 29 U.S.C. § 1001(b); *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 (9th Cir. 1995) (remedial purpose of ERISA requires broad reading).

Congress explicitly excepted some nondiscriminatory causes from its prohibition against disparities in benefit accrual.

² We acknowledge that our holding requiring that employees receive credit for years they were not Plan participants is contrary to Plan § 2.01(C). Section 2.01(C) of the Plan provides that "an Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 shall become a Member on December 25, 1988 but shall not receive Credited Service for his pre-Member service." However, plan provisions are not controlling if they are inconsistent with the provisions of ERISA. *See* ERISA § 404(1)(D), 29 U.S.C. § 1104(1)(D) (1988 & Supp. V 1993).

For example, ERISA § 204(b)(1)(H)(ii), 29 U.S.C. § 1054(b)(1)(H)(ii) (1988), provides:

A plan shall not be treated as failing to meet the requirements of this subparagraph because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

Under this provision, differences in accrual caused by a plan's service cap or early retirement provisions are permissible, even though they may result in disparities. See *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197, 1200-01 (8th Cir. 1992). When Congress enumerates an exception or exceptions to a rule, we can infer that no other exceptions apply. *Koniag v. Koncor Forest Resource*, 39 F.3d 991, 998 (9th Cir. 1994); *Horner v. Andrzejewski*, 811 F.2d 571, 574-75 (Fed. Cir.), cert. denied, 484 U.S. 912 (1987); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47.23 (5th Ed. 1992). Therefore, Congress' express exception of some nondiscriminatory causes of disparities in benefit accrual indicates that other discriminatory causes — such as Lockheed's previously lawful exclusion of Spink from participation — are not permissible.

Research into the legislative history also verifies our reading of the language of the OBRA 1986 amendments. An earlier version of OBRA 1986 adopted a Senate amendment that specifically provided that OBRA 1986 would apply only to individuals employed after December 31, 1988 and only to accrual computation periods beginning after December 31, 1986. H.R.

Rep. No. 99-1012, 99th Cong., 2d Sess. 377 (1986), reprinted in 1986 U.S.C.C.A.N. 4022, and 132 Cong. Rec. 25,044 (1986). Under this provision, pre-1986 employment was clearly excluded. However, Congress rejected this proposal in conference, see H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 378 (1986), reprinted in 1986 U.S.C.C.A.N. 4023, and instead adopted a provision that would apply to all employees "who have one hour of service in any plan year to which the amendments apply." OBRA § 9204(a)(1). Congress knew the appropriate and specific language necessary to exclude pre-1988 service and chose not to include it. See *Arizona Elec. Power Co-op v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987). When Congress includes limiting language in an earlier version of a bill, but deletes it prior to enactment, we presume that the limitation was not intended. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Finally, we note that other provisions of OBRA 1986 demonstrate that Congress was well aware of how to limit application of the amendment to post-enactment service years. Section 9204(b) provides that "amendments made by section 9203 [amending 29 U.S.C. §§ 1002(24)(B) & 1052(a)(2) and 26 U.S.C. §§ 410(a)(2) & 411(a)(8)] shall apply only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date." (Emphasis added). Since Congress chose not to include such a limitation in OBRA § 9204(a), the provision governing the effective date of §§ 9201 and 9202, we can infer that Congress did not intend that limitation to apply to those sections. See *Russello*, 464 U.S. at 23.

Lockheed contends that § 9204(b) compels the opposite result. To reach this conclusion, Lockheed points to the fact that § 9204(b) amends ERISA § 202, 29 U.S.C. § 1052, which

contains minimum participation standards. Lockheed starts with the observation that ERISA §§ 204(b)(1) and (b)(4)(A) provide that benefit accrual is based on years of participation. From there, Lockheed reasons that by limiting the retroactivity of participation requirements through § 9204(b), Congress indirectly limited the benefit accrual calculation to years after OBRA 1986's effective date. If § 9204(b) were the only statement about the effective date of OBRA 1986, Lockheed's reasoning might be persuasive. However, § 9204(b) is directly preceded by § 9204(a)(1), which explicitly pertains to the amendments made by the OBRA provisions at issue, §§ 9201 and 9202.

The first clauses of §§ 9204(a)(1) and 9204(b) are virtually identical. Both state that the amendments they govern shall apply "only with respect to plan years beginning on or after January 1, 1988, . . ." However, the latter portion of § 9204(b) includes the further limitation that the amendments made by § 9203 apply "only with respect to service performed on or after such date." By contrast, § 9204(a)(1) concludes that §§ 9201 and 9202 apply "only to employees who have 1 hour of service in any plan year to which such amendments apply." We cannot comprehend any logical reason why Congress would not include a limitation in the immediately preceding subsection, which would *directly* limit the application of benefit accrual standards, but instead include a temporal limitation in § 9204(b), thereby *indirectly* limiting the application of benefit accrual standards. See *Russello*, 464 U.S. at 23 (declining to find that differing language in two subsections has the same meaning).

All aspects of OBRA 1986's language, structure, and legislative history indicate Congress' intention that pre-enactment service years be included in calculating benefit accrual for older

employees.³ Lockheed withheld Spink's service years from 1979 to December 25, 1988. Therefore, Spink has stated a claim for violation of OBRA 1986 upon which relief can be granted.⁴

IV. THE 1990 PLAN AMENDMENTS

Next we turn to Lockheed's amendment of the Plan to allow "purchases" of releases of potential claims. Spink contends that Lockheed violated ERISA when it adopted the 1990 Plan amendments, which required employees to execute a release of all

³ Both parties have implored us to apply the IRS's proposed regulations interpreting OBRA. Spink seeks to have us follow the reasoning of *Puckett*, 705 F. Supp. at 423, which relied on the IRS's proposed regulations to find that OBRA requires that pre-1988 service be included in benefit accrual. In reaching its decision, the *Puckett* court relied on the language in the regulations that states, "For a participant who has at least 1 hour of service for the plan sponsor in a plan year beginning in 1988 or thereafter, a defined benefit plan may not disregard any years of service, including years of service before 1988, because of age in determining the participant's plan benefit." Prop. Treas. Reg. 1.411(b)-2(f)(1)(ii), 26 C.F.R. Part 1, 53 Fed. Reg. 11876, 11884 (April 11, 1988).

Lockheed would instead have us rely on other language in the proposed regulations, "However, a defined benefit plan is not required under section 411(b)(1)(H) and paragraph (b) of this section to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan . . .", *id.*, and other provisions that suggest pre-1988 service should not be credited to employees in Spink's position. See 26 C.F.R. Part 1, 53 Fed. Reg. 11877.

We decline to apply either of these interpretations. Although the IRS has announced its intention to adopt final regulations that are essentially consistent with these proposed regulations, see I.R.S. Notice 88-126; 54 Fed. Reg. 604-01, it has not yet done so, and we need not accord deference to its proposed interpretations. See *Oakley v. City of Longmont*, 890 F.2d 1128, 1133 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).

⁴ In Count V of his complaint, Spink claims that the doctrine of equitable estoppel bars Lockheed from denying credit for his post-1979 service. Because we conclude that OBRA 1986 requires employers to credit preenactment service, we need not address the equitable estoppel claim.

potential claims before they could elect the SRO or VRP options and receive enhanced benefits. He contends that this arrangement involved the use of existing plan assets to benefit Lockheed and constituted a prohibited transaction with a party in interest, a *per se* violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) (1988).⁵ We agree.

ERISA provides, in pertinent part:

A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan

ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). "Party in interest" is defined in ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C) (1988), to include "an employer any of whose employees are covered by such plan."

Undeniably Lockheed is a party in interest under 29 U.S.C. § 1002(14)(C). It is equally indisputable that a party in

⁵ Spink also argues in the alternative, both in his complaint and before this court, that Lockheed's 1990 Plan amendments constituted a breach of Lockheed's fiduciary duty, prohibited by ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i), and an unlawful inurement of plan assets barred by ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). Because we hold that Spink's second cause of action states a viable claim for violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106, we leave for another day the issue of whether an employer acts as a fiduciary when it amends the plan in a way that affects plan assets. We also decline to address Spink's anti-inurement argument.

interest who benefitted from an impermissible transaction can be held liable under ERISA. See, e.g., ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988); *Nieto v. Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988) (stating that ERISA § 502(a)(3) gives plan participants the right to seek equitable relief against both the trustees who engaged in prohibited transaction and the party in interest who profited from it); *Kyle Rys. v. Pacific Admin. Servs.*, 990 F.2d 513, 516 (9th Cir. 1993) ("Under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), equitable relief for non-fiduciary liability is available only where a "party in interest" has participated in "prohibited transactions."). The only remaining question, then, is whether the 1990 Plan amendments were a transaction that directly or indirectly benefitted Lockheed.

Lockheed advances two arguments why we should answer this question in the negative. First, Lockheed suggests that by amending the Plan, it was merely imposing an eligibility requirement (signing a release of employment-related claims) on the SRP or VRP benefits. Employers have free rein under ERISA, Lockheed proclaims, to impose eligibility requirements and amend plans. Alternatively, Lockheed argues that the releases it obtained as a result of the 1990 Plan amendments were not a "benefit" to Lockheed in violation of ERISA. We address these arguments in turn.

Relying on *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988), and *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1026 (N.D. Cal. 1988), Lockheed claims that it has the unfettered right to amend the Plan and to establish eligibility requirements. Indeed, this court has held that "[employers] remain free to unilaterally amend or eliminate [severance] plans, without considering the employees'

interests." *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994) (emphasis supplied).

Lockheed misinterprets these statements, however, and overstates its freedom to amend. An employer's freedom to amend, while extensive, is not boundless. Lockheed is free to disregard employees' interests in amending the Plan, but it is not free to disregard the prohibitions of ERISA. "The substantive terms of . . . employee benefit plans must comply with the detailed and comprehensive standards of ERISA." *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

ERISA prohibits use of plan assets by or for the benefit of sponsoring parties in interest. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). This prohibition would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question. Similarly, those provisions prohibit plan documents from providing for use of plan funds to buy the releases. In other words, Lockheed cannot avoid the prohibitions of ERISA by writing an amendment instead of a check. See *M & R Invs. Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982) (holding that a plan amendment requiring the plan to lend money is a violation of ERISA § 406(a)(1)(B), 29 U.S.C. § 1006(a)(1)(B)); *Amalgamated Clothing and Textile Workers Union v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (finding plaintiff stated a viable claim by alleging that through amending and terminating plan, fiduciaries misused plan assets to further interests other than those of plan participants).

Lockheed's second argument is that the releases either were not a net benefit to Lockheed, or that they were merely an

incidental benefit. Lockheed urges that the releases do not yield any net benefit to Lockheed because funds paid in exchange for the releases ultimately reduced the amount of surplus that will revert back to Lockheed upon termination of the Plan. Additionally, Lockheed reasons that the releases did not come free to Lockheed because it is ultimately responsible for any Plan shortfall.

Lockheed's astute examination of the economic realities of this situation ignores the central purpose of ERISA. The statute does not require employers to provide employee benefit plans; however, once an employer places assets in trust for the benefit of employees, it can no longer treat those assets as its own. "The crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators" *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985). Indeed, Lockheed's reasoning proves too much: It would justify an employer spending plan assets freely, without regard to any of ERISA's prohibitions. The logic of Lockheed's argument collapses under its own weight.

The releases at issue cannot be accurately characterized as an incidental benefit. Although no copy of the release appears in the record, the Plan describes the releases as waiving "any claims the Eligible Member may have against [Lockheed] arising from termination of employment or otherwise." Plan § 15.03(B)(4). The releases purport to be all-encompassing,⁶ and assuming *arguendo* that such releases are valid despite their breadth, they relieved Lockheed of countless liabilities or potential liabilities to

⁶ Spink did not raise, and therefore we do not address, the issue of whether Lockheed's waivers are impermissibly broad in their scope, or whether an employer can condition the receipt of benefits on a release of claims.

thousands of employees. This windfall can hardly be considered an incidental benefit. The fact that the amount of Lockheed's liability is not readily quantifiable does not render it incidental.

For these reasons, we conclude that the Lockheed's [sic] adoption of the 1990 Plan amendments violated ERISA because the amendments provided for use of Plan assets to purchase a significant benefit for Lockheed. Spink's second cause of action therefore states a viable claim.

V. COLLATERAL ESTOPPEL

Spink's next contention is that the district court erred when it declined to apply the doctrine of nonmutual offensive collateral estoppel to bar Lockheed from contesting the allegation that it breached its fiduciary duties under ERISA. He argues that Lockheed had a full and fair opportunity to litigate the same issue when it moved to dismiss a nearly identical claim pending before Judge Rafeedie, *see Engineers and Scientists Guild v. Lockheed Corp.*, No. CV 90-6891 ER (GHKx) (C.D. Cal. 1990) (unpublished order), and should be bound by the adverse ruling in that case.

Trial courts have broad discretion to determine when to apply offensive collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). The district court did not abuse its discretion by declining to do so here.

"Only a final judgment that is 'sufficiently firm' can be issue preclusive." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988) (citing *Luben Indus. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983)). To ascertain the "firmness" of a

judgment, courts look to various factors, including whether the decision was tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or was actually reviewed on appeal. *Luben*, 707 F.2d at 1040 (quoting Restatement (Second) of Judgments § 13 cmt. g (1982)). In *Luben*, we affirmed the district court's determination that an interlocutory order issued by another judge in the same district was not "sufficiently firm" because "it could not have been the subject of an appeal." *Id.*

Judge Rafeedie's denial of Lockheed's motion to dismiss in *Engineers and Scientists Guild* was not appealable and the parties subsequently settled the case. Under those circumstances, the district court did not abuse its discretion by refusing to apply issue preclusion to bar Lockheed from contesting Spink's fiduciary breach claim.

VI. ATTORNEYS' FEES

Finally, we consider Spink's request for attorneys' fees pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1988). This provision grants us discretion to determine whether to award attorneys' fees and costs. 29 U.S.C. § 1132(g)(1). In exercising that discretion, we consider the following criteria:

"(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of

an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative legal merits of the parties' positions."

Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1528-29 (9th Cir. 1993) (as amended Mar. 22, 1994) (quoting *Oster v. Barco of Cal. Employees' Retirement Plan*, 869 F.2d 1215, 1222 (9th Cir. 1988)). We read § 1132(g)(1) "broadly to mean that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under the plan, should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust." *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 (9th Cir. 1995) (internal quotations omitted).

Since most of the pertinent factors weigh in favor of Spink, we conclude that attorneys' fees are appropriate. With respect to Lockheed's culpability, as we indicated above, Lockheed's manipulation of plan assets was in direct contravention of the express provisions of ERISA. Spink's claims in Counts I, II, and III of his complaint posited significant legal questions designated as a class action brought on behalf of all similarly situated employees. Lockheed is well able to satisfy a fee award and our award of fees will deter other employers from manipulating plan assets through plan amendments. Although Lockheed prevailed on the collateral and equitable estoppel claims and its arguments on the age discrimination claim were tenable, its arguments regarding the validity of the 1990 Plan amendments were meritless. Spink is entitled to attorneys' fees.

VII. CONCLUSION

For the foregoing reasons, the district court's dismissal of Counts I, II, and III of Spink's complaint is REVERSED; the district court's dismissal of Count V and the district court's denial of Spink's motion to collaterally estop Lockheed from contesting the allegation that it breached its fiduciary duty is AFFIRMED; Spink's request for attorneys' fees is GRANTED.

REVERSED in part; AFFIRMED in part.

NOT FOR PUBLICATION
No. 92-56094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. SPINK,

Plaintiff-Appellant,

v.

LOCKHEED CORPORATION; DANIEL M. TELLEP; ROBERT
A. FURMAN; VINCENT N. MARAFINO; K.H. ANDERSON;
L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L.
BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G.
VAN SHAICK; W.T. VINCENT,

Defendants-Appellees.

Filed September 1, 1995

Before: D.W. NELSON, REINHARDT, and BRUNETTI,
Circuit Judge.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, et al.,

Plaintiffs,

v.

LOCKHEED CORPORATION, et al.,

Defendants.

CASE NO. CV 92-800 SVW (GHKx)

July 31, 1992, Filed and Entered

ORDER GRANTING DEFENDANT LOCKHEED
CORPORATION'S MOTION TO DISMISS

I. BACKGROUND

Paul L. Spink, the named Plaintiff, seeks additional pension benefits under the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan") sponsored by the named Defendant, Lockheed Corporation ("Defendant"). Defendant first employed Plaintiff in 1939, and then intermittently through 1950. After an interim of nearly thirty years, Defendant again hired Plaintiff in May 1979. Under the Plan terms in effect at the time of his hire in 1979, Defendant lawfully excluded Plaintiff from participating in the Plan because he was over sixty years old.

However, changes in federal law in 1986 compelled Defendant to permit Plaintiff to participate in the Plan beginning on December 25, 1988, the commencement date of the first fiscal Plan year following January 1, 1988. Plaintiff subsequently accrued benefits under the Plan until his retirement in June 1990.

In an effort to attenuate the effects of anticipated layoffs by inducing voluntary retirement, Defendant amended the Plan in 1990 to provide enhanced retirement benefits, allegedly paid out of surplus Plan funds, to participants deemed eligible to take early retirement. Participants choosing this option were required to sign a waiver of employment related claims. Although eligible, Plaintiff did not retire pursuant to this early retirement program.

In this action, Plaintiff alleges the following three claims in his individual capacity, and also on behalf of all similarly situated employees: first, statutory amendments to the federal law governing benefit plans allegedly require Defendant to provide retroactive participation and benefit accrual to all employees, like Plaintiff, who were excluded from Plan participation before 1988 because of age, and who have worked at least one hour in 1988; second, Defendant's 1990 Plan amendment allegedly breached a fiduciary duty in violation of federal law; and third, the same Plan amendment allegedly constituted a federally prohibited transaction because it benefitted Defendant, a party-in-interest. Finally, in a fourth claim brought solely in his individual capacity, Plaintiff alleges that he is personally owed retroactive benefits based on

equitable estoppel stemming from Defendant's alleged oral misrepresentations.¹

On April 2, 1992, Defendant filed this Motion to Dismiss the entire action, pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that: the relevant federal law is exclusively prospective regarding plan participation and benefit accrual; amending the Plan did not violate a fiduciary duty because no such duty applied; and, as pleaded, federal law does not allow recovery for alleged oral misrepresentations. The Court held a hearing on April 27, 1992 to consider this motion. Having considered the arguments of counsel, both written and oral, the Court GRANTS Defendant's Motion to Dismiss in its entirety because even assuming the truth of Plaintiff's allegations for the purposes of this Motion, Plaintiff fails to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

A. Alleged Violations of ERISA and ADEA

Plaintiff focuses on certain provisions of the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), 100 Stat. 1973, that amended the Employee Retirement Income Security Act of 1974 ("ERISA"), ch. 18, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 301-1144), the Age Discrimination in Employment Act ("ADEA"), ch. 14, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34), and the Internal Revenue Code of 1986, 26

¹ In response to Defendant's Motion to Dismiss, Plaintiff filed an amended opposition on April 17, 1992 withdrawing Count IV, a claim for benefits under the Plan, from his Complaint.

U.S.C. Prior to OBRA 1986, none of these statutes prevented an employer from denying participation in its pension plan to employees who were hired after age sixty if the normal retirement age was sixty-five. Indeed, both ERISA and the IRC specifically allowed this practice until OBRA 1986 proscribed it.

In order to accomplish comprehensive reform, OBRA 1986 amended ERISA, the ADEA, and the IRC together. Thus, OBRA 1986 amended the plan participation provisions of both ERISA, 29 U.S.C. § 1052(a), and the IRC, 26 U.S.C. § 410(a)(2), as well as the benefit accrual provisions of ERISA, 29 U.S.C. § 1054(b)(1)(H), the ADEA, 29 U.S.C. § 623(j), and the IRC, 26 U.S.C. § 411(b)(1)(H).

The central legal issue Plaintiff raises under OBRA 1986 concerns the effective dates of the amended provisions of ERISA and the ADEA, rather than their substantive provisions. Plaintiff asserts that the OBRA 1986 amendments entitle him to retroactive Plan participation, and concomitant benefit accrual, for those years of employment following his hire in 1979 and preceding his initial Plan participation in 1988. Plaintiff's thesis is that Defendant failed to comply with the provisions of amended ERISA — namely, 29 U.S.C. § 1052(a)(2) — by not allowing him, once he had worked an hour of service in 1988, to participate retroactively in and, thus, to accrue benefits retroactively under the Plan.

The plain language of OBRA 1986, however, defeats Plaintiff's claim. The court holds that the relevant effective date provisions of the OBRA 1986 amendments to ERISA and the ADEA are *prospective* and thus do not provide Plaintiff the grounds to participate retroactively for periods of service prior to

his joining the Plan on December 25, 1988, nor to receive retroactive benefit accrual.

First, as concerns Plan participation, OBRA 1986 § 9203(a) amended ERISA such that "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." See 29 U.S.C. § 1052(a)(2). However, OBRA 1986 § 9204(b) further states that "the amendments made by section 9203 shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* with respect to service performed on or after such date" (emphasis added). Thus, OBRA 1986 only required Defendant to allow Plaintiff to participate in the Plan beginning December 25, 1988 — because that date marked the beginning of the first fiscal Plan year following January 1, 1988 — and not for prior Plan years.

Second, because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual. To this end, the Court holds that one must first be a plan participant before one can enjoy benefit accrual. See 29 C.F.R. § 2530.204-1(b)(1) (service before an employee first becomes a plan participant is disregarded for benefit accrual purposes).

Moreover, the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion. In particular, OBRA 1986 §§ 9201 and 9202 amended the benefit accrual language in both ERISA and the ADEA to make unlawful "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's accrual on account of age." However, OBRA 1986 § 9204(a) plainly states that "the amendments made by sections 9201 [ADEA] and 9202 [ERISA] shall apply *only* with

respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). As such, it is apparent that Congress did not intend to retroactively impact benefit accrual provisions prior to January 1, 1988.

Given Congress' intention in this analogous context, Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation. To reiterate, the Court finds Plaintiff's argument unsupported by the unambiguous statutory language. Section 9204(a), which concerns the effective dates of OBRA 1986's participation amendments, plainly states: "The amendments made by section 9201 [ADEA] and 9202 [ERISA] shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). Therefore, because the OBRA 1986 amendments only apply to Plan years beginning on or after January 1, 1988, Plaintiff is entitled neither to participate retroactively nor to accrue benefits retroactively for Plan years before 1988.

B. Alleged Violations Through Plan Amendment

Plaintiff next contends that in amending the Plan in 1990, Defendant breached its fiduciary duty under ERISA. This claim is based on the false assumption that amending the Plan constituted a fiduciary act. Plaintiff correctly observes that a corporate sponsor must discharge its obligations solely in the interests of the participants and beneficiaries when acting in its role as plan administrator. However, where, as here, a defendant is both an employer and an administrator of a pension plan, it is subject to

separate and differing responsibilities depending upon the role it is performing. As the Second Circuit has stated: "ERISA permits employers to wear 'two hats,' and . . . assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (quoting *Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)), *cert. denied*, 474 U.S. 1113 (1986). Therefore, when acting in its corporate capacity, Defendant was obligated to "see that such benefit plans as it [chose] to maintain [were] designed to further the company's business interests in consonance with the company's obligations to its stockholders." *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020; *see also Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets."), *cert. denied*, 481 U.S. 1016 (1987). As the Third Circuit explained:

Virtually every circuit has rejected the proposition that ERISA's fiduciary duties attach to an employer's decision whether or not to amend an employee benefit plan. . . . [It is] extremely unlikely that Congress, in defining an ERISA fiduciary in section 3(21)(A), intended that the word "administration" encompass amendment decisions, thus sweeping away by indirection the limitations so meticulously built into the participation and vesting requirements.

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1161 (3rd Cir. 1990). The Sixth Circuit has similarly reasoned:

There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second The case law . . . makes it clear that when an employer decides to establish, *amend*, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

Musto, 861 F.2d at 911-12 (emphasis added). Finally, the Ninth Circuit similarly differentiates the duties owed in amending a plan from those arising from plan administration. Reflecting this approach, the Ninth Circuit held in *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988), that amending a benefit plan so that a corporate sponsor would receive any surplus funds not needed to pay participants did not by itself comprise an ERISA violation, but only constituted "a claim upon which relief may be granted in the context of the complaint's further allegations that the *fiduciaries* misused plan assets." *Id.* (emphasis added). In sum, the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan; whereas, in their role as plan administrator with concomitant fiduciary duties, the same corporate sponsor must act in the sole interest of plan participants and beneficiaries when administering plan provisions.

Here, Defendant was not acting in its role as a plan administrator when it amended the Plan. Rather, amending the Plan to provide enhanced retirement benefits constituted a business judgment that properly resided with corporate officers. Therefore,

Defendant's actions can not comprise a breach of the fiduciary duty owed to the Plan participants because no such fiduciary duty existed. Indeed, the sole fiduciary duty implicated by the amendment was the duty owed to Defendant's stockholders. The Court views the subsequent payment of enhanced benefits to selected participants as merely Defendant's adherence, in its role as Plan administrator, to the terms of the lawfully amended Plan. As such, Plaintiff fails to allege facts to state a breach of fiduciary duty under ERISA independent of the amendment's substantive provisions. Further, Plaintiff mistakenly relies on 29 U.S.C. § 1344(d)(1) to argue that only through the process of plan termination does an exception arise to the general principle that benefits must never, more than incidentally, inure to an employer as a party-in-interest. The process of plan termination allows this exception under the *fiduciary* responsibilities arising from plan administration. Hence, Plaintiff's argument is inapposite because the violations alleged arise from the amendment of the Plan and not from the subsequent administration of its terms.

Plaintiff's attempts to distinguish the cases cited above fall far short of the mark.² The factual distinctions relied upon are not significant in the cases themselves and are nonexistent in the relevant statutes. In short, Plaintiff offers no authority to support his argument that the distinctions culled are of legal significance.

Plaintiff also asserts that Defendant specifically violated its fiduciary duty in requiring those participants electing to receive enhanced retirement benefits to execute a release of employment

² Plaintiff urges that the cases are distinguishable because, *inter alia*, they involve welfare rather than pension plans, unfunded or underfunded plans, amendments to terminate a plan, the initial creation and design of a plan, and/or amendments that only benefit the sponsor in an incidental manner.

related claims. The Court disagrees and finds that this release condition, as embodied in the Plan amendment, was a design feature not subject to the scrutiny of ERISA's fiduciary standards unless improperly administered. This very type of release provision has been upheld in a case involving an initial plan creation, *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1025 (N.D. Cal. 1988), and the Court finds no holding, statute, or compelling reason to prohibit its inclusion through the amendment of a continuing plan.³

Finally, Plaintiff contends that the doctrine of collateral estoppel precludes Defendant from contesting Plaintiff's fiduciary breach theory in relation to the Plan amendments. Plaintiff alleges that Defendants had a full and fair opportunity to litigate these same Plan amendment issues in a previous motion to dismiss in a similar cause of action. *Engineers and Scientists Guild v. Lockheed Corp.*, No. CV 90-6891 ER (GHKx) (C.D. Cal. 1990). The Court rejects this claim because the mere refusal by the prior court to grant the motion to dismiss did not adversely resolve any factual issues against Defendant, nor did it constitute a sufficiently firm or sufficiently final judgment. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988).

³ Plaintiff concedes that Defendant would have enjoyed broad discretion in both the establishment and termination of the Plan. The amending of a continuing plan seems similarly legitimate to the Court. Not surprisingly, the case law bears out this intuition. "The case law . . . makes it clear that when an employer decides to establish, amend, or terminate a benefits plan, . . . its actions are not to be judged by fiduciary standards." *Musto*, 861 F.2d at 912 (emphasis added).

C. Alleged Violations Through Oral Misrepresentation

Plaintiff argues in his final claim that despite the express language of the Plan, he is entitled to additional benefits on account of Defendant's alleged oral misrepresentation of coverage.⁴ Defendant responds that ERISA only permits payment of benefits under the written terms of the Plan and no other section of ERISA authorizes recovery on a promissory or equitable estoppel basis.

Plaintiff accurately observes that 29 U.S.C. § 1132(a)(1)(B) allows a participant or beneficiary to bring suit against a plan "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." However, the Ninth Circuit has held that recovery must be based upon the terms of the plan and that alleged oral misrepresentations are insufficient under 29 U.S.C. § 1132(a)(1)(B). Basing its analysis on 29 U.S.C. § 1102(a)(1), which requires benefit plans to be maintained pursuant to a written agreement, the Ninth Circuit rejected a suit for additional plan benefits holding that to allow a claim based on estoppel would conflict with the statutory requirement. *Davidian v. So. Calif. Meat Cutters Union & Food Employees Benefit Fund*, 859 F.2d 134, 136 (9th Cir. 1988); see also *Hansen v. Western*

⁴ Although the basis for this claim is unclear, regardless of whether Plaintiff intended to bring this allegation under ERISA or state common law, ERISA explicitly preempts state laws to the extent that they relate to any employee benefit plan not exempt from federal regulation. 29 U.S.C. §§ 1144. Further, cases in the Ninth Circuit have consistently held that ERISA preempts state law theories of recovery. E.g. *Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991) (holding that ERISA preempts a state law claim based on alleged oral misrepresentation by an employer as to the level of benefits). Therefore, only three statutory grounds, discussed *infra*, survive as conceivable foundations for recovery: 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), and 1132(a)(3).

Greyhound Retirement Plan, 859 F.2d 779, 781 (9th Cir. 1988). In addition, there is no jurisdictional basis in this case for a claim under § 1132(a)(1)(B) because Plaintiff is not suing the Plan.

Second, although 29 U.S.C. § 1132(a)(2) permits a claim for equitable relief founded on a violation of fiduciary duty, the Supreme Court held in *Massachusetts Mutual Life Insurance Co. v. Russell*, 477 U.S. 134, 142, 105 S. Ct. 3085, 3090, 87 L. Ed. 2d 96 (1985), that any amounts recovered under § 1132(a)(2) must be paid to a plan, not to an individual participant or beneficiary. In this action, recovery under § 1132(a)(2) is untenable because Plaintiff's oral misrepresentation claim is brought solely in his individual capacity, not on behalf of the Plan.

Finally, while 29 U.S.C. § 1132(a)(3) permits an action for equitable relief to enforce the terms of a plan, the Ninth Circuit has held that a suit for fiduciary breach may only be brought if recovery would inure to the benefit of the plan as a whole and not to individual participants. *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991). Again, Plaintiff brings his oral misrepresentation claim in his individual capacity and, thus, § 1132(a)(3) does not apply.

III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss in its entirety, and DISMISSES Plaintiff's Complaint WITH PREJUDICE for failure to state a

claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

IT IS SO ORDERED.

DATED: July 31, 1992

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

STATUTORY APPENDIX*Employment Retirement Income Security Act*

§ 3(21)(A), 29 U.S.C. § 1002(21)(A) 36a

§ 406(a), 29 U.S.C. § 1106(a) 37a

Omnibus Budget Reconciliation Act of 1986

§ 9201, 29 U.S.C. § 623(i)(1) 38a

§ 9202(a)(2), 29 U.S.C. § 1054(b)(1)(H)(i) 38a

§ 9203(A) 39a

§ 9204, 29 U.S.C. § 623 note 39a

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the

administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

ERISA § 406(a), 29 U.S.C. § 1106(a)

Except as provided in section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect --

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a).

**OBRA 1986 § 9201, 100 Stat. 1973-74 (1986),
codified at 29 U.S.C. § 623(i)(1)**

Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding at the end the following new subsection:

"(i)(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

"(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

"(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

"(2) . . ."

**OBRA 1986 § 9202(a)(2), 100 Stat. 1975 (1986),
codified at 29 U.S.C. § 1054(b)(1)(H)(i)**

Defined Benefit Plans -- Section 204(b)(1) of [ERISA] is amended by adding at the end thereof the following subparagraphs:

"(H)(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's

benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

"(ii) . . ."

OBRA 1986, § 9203(a), 100 Stat. 1979 (1986)

Repeal of Provisions Permitting Certain Plans to Exclude Older Employees from Plan Participation on the Basis of Age --

(1) ERISA amendment -- Section 202(a)(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1052(a)(2)) is amended by striking out "unless --" and all that follows and inserting in lieu thereof a period.

(2) IRC amendment -- Section 410(a)(2) of the Internal Revenue Code of 1986 (relating to maximum age conditions) is amended by striking out "unless --" and all that follows and inserting in lieu thereof a period.

**OBRA 1986 § 9204, 100 Stat. 1979-80 (1986),
codified at 29 U.S.C. § 623 note**

(a) Applicability to Employees with Service after 1988 --

(1) In General -- The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

(2)

(b) **Applicability of Amendments Relating to Normal Retirement Age** — The amendments made by section 9203 shall apply only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date.

(c)